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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 CHARLES ASBERGER,  
8 Plaintiff,  
9 v.  
10 CAROLYN W. COLVIN, Acting  
11 Commissioner of Social Security,  
12 Defendant.

Case No. 2:14-cv-01209-RFB-PAL

**ORDER ADOPTING REPORT &  
RECOMMENDATION OF MAGISTRATE  
JUDGE PEGGY A. LEEN**

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14 **I. INTRODUCTION**

15 Before the Court for consideration is the Report and Recommendation of the Honorable  
16 Peggy A. Leen, United States Magistrate Judge, entered November 30, 2016. (ECF No. 28). For  
17 the reasons discussed below, the Report and Recommendation is adopted in full.

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19 **II. BACKGROUND**

20 Neither party objected to the Magistrate Judge's summary of the background facts, and so  
21 the Court incorporates and adopts, without restating, that "background" section here. (See Report  
22 1:19–2:27, ECF No. 28). The Court adds the following procedural history.

23 Plaintiff Charles Asberger ("Plaintiff") filed his Complaint on October 8, 2014. (ECF No.  
24 3). On January 29, 2015, Plaintiff filed a Motion to Remand, arguing that the Administrative Law  
25 Judge ("ALJ") failed to properly evaluate the medical evidence of record in assessing Plaintiff's  
26 residual functional capacity ("RFC"), and requesting that the Court reverse and award benefits, or  
27 remand to the agency. (ECF No. 17). Defendant Carolyn W. Colvin ("Defendant") filed a Cross-  
28 Motion to Affirm the ALJ's decision on May 1, 2015. (ECF No. 22). Defendant also filed a

1 Response to the Motion to Remand on May 1, 2015. (ECF No. 23). Plaintiff filed a Reply to his  
2 Motion on May 21, 2015. (ECF No. 24). Judge Leen issued a Report and Recommendation on  
3 November 30, 2016 recommending denial of Plaintiff's Motion and granting Defendant's Motion.  
4 (ECF No. 28). On December 12, 2016, Plaintiff filed an Objection to this recommendation. (ECF  
5 No. 29). Defendant filed a Response to the Objection on December 27, 2016. (ECF No. 30).

### 6 7 **III. LEGAL STANDARD**

8 A district court "may accept, reject, or modify, in whole or in part, the findings or  
9 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). A party may file specific  
10 written objections to the findings and recommendations of a magistrate judge. Id. § 636(b)(1);  
11 Local Rule IB 3-2(a). When written objections have been filed, the district court is required to  
12 "make a de novo determination of those portions of the report or specified proposed findings or  
13 recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

14 42 U.S.C. § 405(g) provides for judicial review of the Commissioner's disability  
15 determinations and authorizes district courts to enter "a judgment affirming, modifying, or  
16 reversing the decision of the Commissioner of Social Security, with or without remanding the  
17 cause for a rehearing." In undertaking that review, an ALJ's "disability determination should be  
18 upheld unless it contains legal error or is not supported by substantial evidence." Garrison v.  
19 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation omitted). "Substantial evidence means more  
20 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable  
21 person might accept as adequate to support a conclusion." Id. (quoting Lingenfelter v. Astrue, 504  
22 F.3d 1028, 1035 (9th Cir. 2007)) (quotation marks omitted).

23 "If the evidence can reasonably support either affirming or reversing a decision, [a  
24 reviewing court] may not substitute [its] judgment for that of the Commissioner." Lingenfelter,  
25 504 F.3d at 1035. Nevertheless, the Court may not simply affirm by selecting a subset of the  
26 evidence supporting the ALJ's conclusion, nor can the Court affirm on a ground on which the ALJ  
27 did not rely. Garrison, 759 F.3d at 1009–10. Rather, the Court must "review the administrative  
28 record as a whole, weighing both the evidence that supports and that which detracts from the ALJ's

1 conclusion,” to determine whether that conclusion is supported by substantial evidence. Andrews  
2 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

3 The Social Security Act has established a five-step sequential evaluation procedure for  
4 determining Social Security disability claims. See 20 C.F.R. § 404.1520(a)(4); Garrison v. Colvin,  
5 759 F.3d 995, 1010 (9th Cir. 2014). “The burden of proof is on the claimant at steps one through  
6 four, but shifts to the Commissioner at step five.” Garrison, 759 F.3d at 1011. Here, the ALJ  
7 resolved Plaintiff’s claim at step four. (AR 19). At step four, the ALJ considers the assessment of  
8 the claimant’s RFC as well as the claimant’s capability of performing past relevant work. Garrison,  
9 759 F.3d at 1011. RFC is defined as the most an individual is capable of doing in a work setting  
10 despite the individual’s impairments and related symptoms, such as pain. 20 C.F.R. §  
11 416.945(a)(1). If the claimant is incapable of performing past relevant work, the ALJ determines  
12 whether the claimant can make an adjustment to substantial gainful work other than his past  
13 relevant work in step five. 20 C.F.R. § 404.1520(g).

#### 14 15 **IV. DISCUSSION**

16 ALJ Craig Ellis issued a decision on February 6, 2013 finding Plaintiff ineligible for  
17 disability under sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act. (AR 32-33).  
18 The ALJ determined that Plaintiff had the following severe impairments: degenerative disc disease  
19 and arthritis of the cervical, thoracic, and lumbar spine. (AR 17). The ALJ found that Plaintiff also  
20 had a number of nonsevere impairments. (AR 17-19). The ALJ concluded that Plaintiff had the  
21 residual functional capacity to perform “light work” as defined in 20 C.F.R. 404.1567(b) and  
22 416.967(b), and could resume performance of past relevant work as a casino gaming dealer. (AR  
23 19; AR 30). Specifically, the ALJ found that Plaintiff could do the following: frequently lift and  
24 carry no more than ten pounds and occasionally lift and carry twenty pounds; sit for six of eight  
25 hours in a workday; stand and/or walk for six of eight hours in a workday; frequently balance,  
26 kneel, and climb stairs/ramps; occasionally stoop, crouch, and crawl; and occasionally climb  
27 ladders, ropes, and scaffolds. (AR 19). The ALJ further found that no assistive device is medically  
28 necessary for ambulation, despite Plaintiff’s use of his mother’s walker, and that Plaintiff is limited

1 to occasional overhead reaching with bilateral upper extremity but had no other limitation in all  
2 other bilateral reaching. (AR 19). The ALJ recommended he avoid concentrated exposure to  
3 workplace hazards, extreme cold, fumes, dusts, gases, odors, and poor ventilation. (AR 23). In so  
4 finding, the ALJ considered all symptoms, and the extent to which those symptoms could  
5 reasonably be accepted consistently with the objective medical evidence, and other evidence,  
6 including opinion evidence. (AR 19). The ALJ considered additional medical records from the  
7 UMC Lied Clinic which Plaintiff submitted after the hearing. (AR 23-25). The ALJ afforded  
8 significant weight to the opinions of consultative examiner Dr. Wenceslao A. Cabaluna, and state  
9 agency reviewing physician Dr. Navdeep Dhaliwal with regard to Plaintiff's physical health. (AR  
10 25; AR 30).

11 Both parties agree that the ALJ fairly and accurately summarized the evidence and  
12 testimony in the record, except as to the arguments in their motions. Plaintiff claims that the UMC  
13 Lied medical records support an RFC of no more than sedentary exertion, and that the opinions of  
14 the consultative examiner and state agency reviewing physician should not be considered  
15 substantial evidence, in light of the UMC medical records. Plaintiff argues these objective findings  
16 are evidence that he lacks the capacity for the prolonged standing and walking required of light  
17 work. Defendant contends that the opinions of Dr. Cabaluna and Dr. Dhaliwal constituted  
18 substantial evidence in support of the ALJ's RFC finding. Defendant argues that Plaintiff's claim  
19 that he can perform no more than sedentary exertional work is unsupported by any medical opinion  
20 and is inconsistent with the record as a whole. Defendant contends that Plaintiff does not point to  
21 any medical opinion that supports his contention that he can perform only sedentary work and  
22 merely provides his own opinion and interpretation of the medical evidence.

23 Judge Leen found that the ALJ's decision was supported by substantial evidence under 42  
24 U.S.C. § 405(g) and that the ALJ did not commit legal error. The Report summarizes the  
25 administrative hearing testimony and Plaintiff's treatment records, including the consulting  
26 examiner's report, the reviewing examiner's report, and the records from the UMC Lied Clinic.  
27 Judge Leen noted that Plaintiff did not cite any record or finding of a treating physician or other  
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1 healthcare provider in support of his argument that he is capable of performing no more than  
2 sedentary work.

3 The Court has reviewed the record and agrees with the conclusion reached in the Report.  
4 The ALJ properly considered all of the evidence in the record, and reached a decision supported  
5 by substantial evidence after having held the record open for over 30 days to allow Plaintiff to  
6 submit updated medical evidence – the records from the UMC Lied Clinic. Having reviewed the  
7 record, including the UMC Lied Clinic documents, the Court adopts Judge Leen’s  
8 recommendation in full. The Court finds that the objective evidence does not support a  
9 determination that Plaintiff is only capable of performing sedentary work.

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11 **V. CONCLUSION**

12 Accordingly,

13 **IT IS HEREBY ORDERED** that the Report and Recommendation (ECF No. 28) is  
14 ADOPTED in full.

15 **IT IS FURTHER ORDERED** that Plaintiff’s Motion to Remand (ECF No. 17) is  
16 DENIED and the Defendant’s Motion to Affirm (ECF No. 22) is GRANTED.

17 **IT IS FURTHER ORDERED** that the Clerk of Court is ordered to enter judgment  
18 accordingly and close this case.

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20 DATED this 5th day of February, 2018.

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22 **RICHARD F. BOULWARE, II**  
23 **UNITED STATES DISTRICT JUDGE**  
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